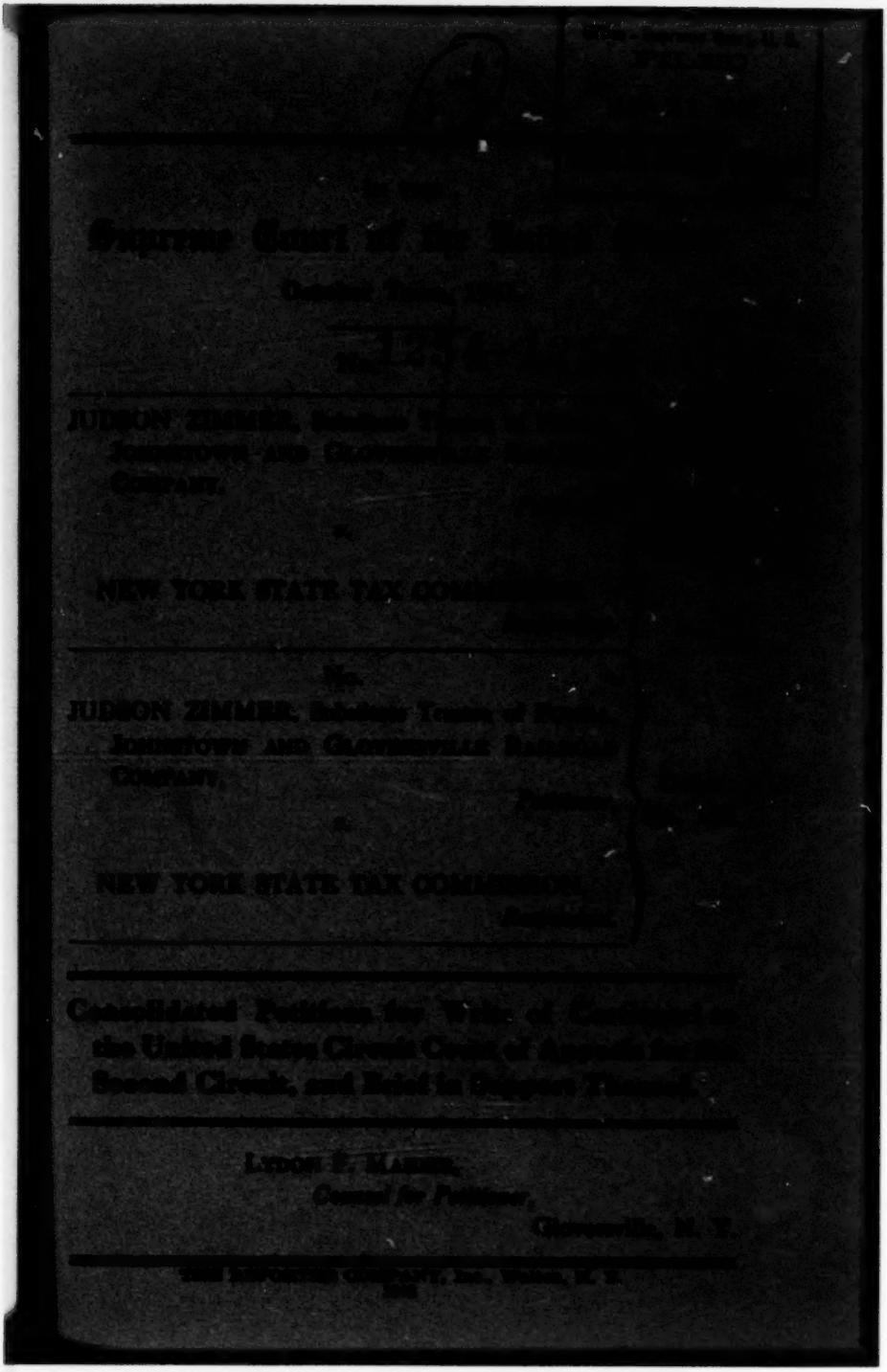

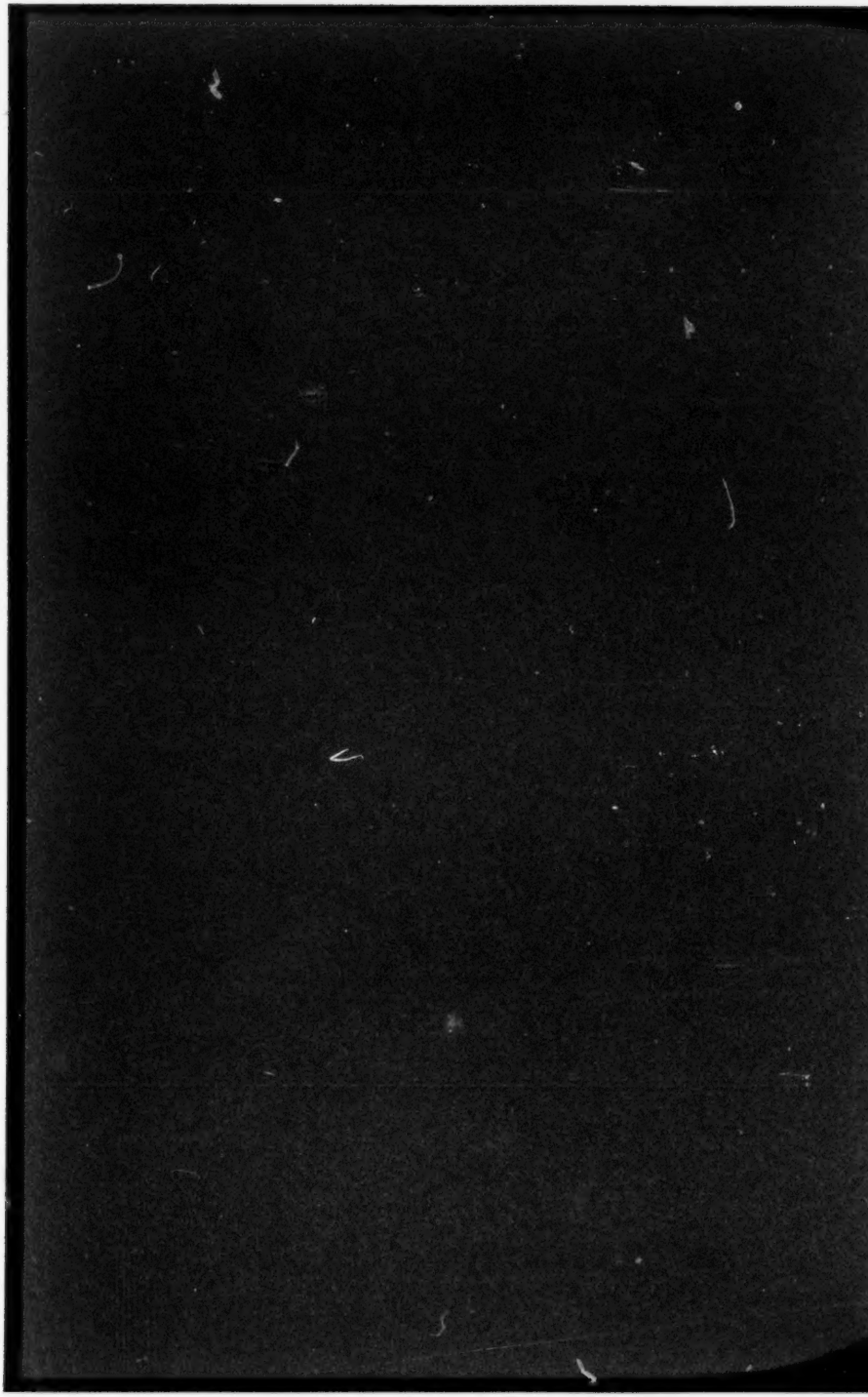

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IN THE

Supreme Court of the United States

October Term, 1941

No.

JUDSON ZIMMER, Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company,

Petitioner,

v.

NEW YORK STATE TAX COMMISSION,

Respondent.

Order No. 168

No.

JUDSON ZIMMER, Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company,

Petitioner,

v.

NEW YORK STATE TAX COMMISSION,

Respondent.

Order No. 169

Consolidated Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Judson Zimmer, Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company, Debtor, prays that writs of certiorari issue to review the orders or judgments of the Circuit Court of Appeals for the Second Circuit, entered in the above causes on the 25th day of March, 1942, by which the claims of the State of New York against him and his predecessor (J. Ledlie Hees, Trustee) for franchise taxes under Sections 183 and 184 of the Tax Law of the State of New York were allowed for periods subsequent to April 20, 1933, the date of the commencement of the trusteeship, thereby affirming in part and reversing in part the orders of the District Court for the Northern District of New York.

These petitions are consolidated in the interest of conserving the time of the Court, and of economy inasmuch as the parties are the same, and the facts, as will more fully appear, while differing in some important aspects, are basically similar.

A. Summary statement of the matters involved.

Fonda, Johnstown and Gloversville Railroad Company, a New York corporation, filed its petition pursuant to Section 77 of the Acts of Congress relating to Bankruptcy on the 20th day of April, 1933. On that day the petition was approved as properly filed and J. Ledlie Hees was appointed Trustee of the Debtor's estate. His appointment was terminated on June 27, 1940, at which time petitioner was made Substitute Trustee by the order of the Court. (W. R. p. 13, G. R. p. 10. See footnote.)

Note: "W. R. refers to the Transcript of Record in the United States Circuit Court of Appeals on appeal from Order No. 168, which is printed in the white cover. "G. R." refers to the Transcript of Record in the United States Circuit Court of Appeals on appeal from Order No. 169, which is printed in the gray cover.

Fonda, Johnstown and Gloversville Railroad Company (hereinafter referred to as "Debtor") is a New York corporation which was created in 1902 as the result of the consolidation of three previously existing New York railroad corporations (G. R. p. 9).

For many years prior to April 20, 1933, the State of New York, for the privilege of exercising corporate franchises or carrying on business in the corporate or organized capacity within the State, imposed taxes on corporations commonly known as "franchise taxes." For railroad corporations, in which class the Debtor was included, the applicable provisions of the Tax Law were Sections 183 and 184 (McKinney's Consolidated Laws of New York Annotated at pages 396 and 401).

Section 183, excluding inapplicable words, reads as follows:

> "* * * For the privilege of exercising its corporate franchise or of holding property in this State every domestic corporation * * * formed for or principally engaged in the conduct of * * * railroad * * * business * * * shall pay, in advance, an annual tax to be computed upon the basis of the amount of its capital stock within this State during the preceding year, and upon each dollar of such amount * * *."

The amount of the tax is specified as being a minimum of not less than $10 nor less than one mill on each dollar of the net value of its issued capital stock which shall have a minimum value of not less than $5 per share.

Section 184 is denominated an "Additional Franchise Tax" and, excluding inapplicable words and phrases, reads:

> "Every corporation * * * formed for or principally engaged in the conduct of * * * surface

> railroad * * * business * * * shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State, an excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings from all sources within this State * * *."

Subsequent to the commencement of the trusteeship the New York State Tax Commission filed with the Trustee claims for franchise taxes under Sections 183 and 184. The Trustee made a motion in the District Court to expunge these claims. Order No. 168 (W. R. p. 10) of the District Court allowed certain of these claims and expunged others. The table which follows indicates the result in the District Court and in the Circuit Court:

Provision of Tax Law	Period	Amount	District Court		Appealed to Circuit Court of Appeals	Circuit Court of Appeals
No. 1. Sec. 183	Beginning 1/ 1/33	$ 628.29	Allowed		No appeal	----
No. 2. Sec. 184	Year ending 6/30/32	2,301.59	Allowed		No appeal	----
No. 3. Sec. 183	Beginning 1/ 1/33	3,164.19	Expunged		No appeal	----
No. 4. Sec. 183	Beginning 1/ 1/34	3,106.20	Expunged		Appeal by State	Reve
No. 5. Sec. 184	Year ending 6/30/34	1,883.55	Allowed Expunged	61.92 1,821.63	Appeal by Trustee Appeal by State	Affirm Reve

The effect of the Act of June 18, 1934 (Section 124-a U. S. C. A. Title 28) was pertinent with respect to Item No. 5 and accounted for its allowance in part. The Act of June 18, 1934, purported to make Trustees appointed by United States Courts who were authorized to conduct any business, subject to "all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation." (See Brief p. 25 for the statute set out *in extenso.*)

The Trustee contended in the District Court and in the Court below that Section 77 of the Bankruptcy Act and the order appointing Trustee (W. R. p. 19) conferred title on a bankruptcy Trustee and inasmuch as his operations were conducted by virtue of the Act of Congress and the order of appointment and conversely not by virtue of the sovereign authority of the State of New York to grant corporate franchises, the event by which taxation was intended to accrue under the statute had not taken place and accordingly he was not liable for the taxes.

The Circuit Court of Appeals was of the opinion that irrespective of the Act of June 18, 1934, the Trustee was liable under New York Law for franchise taxes accruing under Sections 183 and 184 of the Tax Law. The District Court's order was accordingly reversed insofar as it expunged and disallowed Item No. 4 and a part of Item No. 5, and was affirmed insofar as the District Court's order had allowed Item No. 5 in part (Opinion, W. R. p. 52, 126 Fed. 2nd 606).

The State Tax Commission had filed similar claims for franchise taxes under the same statute for periods subsequent to those involved in the proceedings just outlined (G. R. p. 13 *et seq.*). The Substitute Trustee made a similar motion in the District Court to expunge these claims and in addition, to enjoin the filing of similar claims in subsequent years (G. R. p. 7). This motion was denied in every respect and resulted in Order No. 169 (G. R. p. 5) an appeal from which was prosecuted to the United States Circuit Court of Appeals where the order of the District Court was unanimously affirmed (Opinion, G. R. p. 71, 126 Fed. 2nd 604). The reasoning of the Court below will be discussed hereinafter.

B. Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, the Act of March 3, 1891, c. 517, 26 Stat. 828, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

C. Questions presented.

1. Prior to the Act of June 18, 1934 (Section 124-a, U. S. C. A. Title 28) did a bankruptcy Trustee operating a railroad under Section 77 of the Bankruptcy Act *in fact* exercise the privileges of the Debtor corporation specified in Sections 183 and 184 of the New York Tax Law as being the events upon which taxability resulted and *if not,* should he have any liability to pay taxes computed according to the measures indicated?

2. Prior to the Act of June 18, 1934 (Section 124-a, U. S. C. A. Title 28) did Sections 183 and 184 of the New York Tax Law impose upon a bankruptcy Trustee operating a railroad under Section 77 of the Bankruptcy Act, the liability for a license fee for the privilege of exercising the Debtor's corporate franchise?

3. If the answers to questions numbers 1 and 2 are in the negative, did the Act of June 18, 1934, so change the character of a Trustee's operations, the New York Tax Law or the Bankruptcy Act so that thereafter he can be said to be exercising the privileges specified in Sections 183 and 184 which result in taxability?

4. If the answers to questions numbers 1, 2 and 3 are in the negative, in the absence of an affirmative showing and finding of the necessity of preserving the Debtor's corporate franchise and a direct order by the Court so to do, can the taxes under Sections 183 and 184 be said to be proper expenses of administration?

D. Reasons relied upon for the allowance of the writs.

1.

The Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions.

The effect of the decisions below is to decide that Sections 183 and 184 of the Tax Law impose a tax on the operator of a railroad property whether or not the franchise "to be" or "to do" is used. The New York Courts have uniformly and for many years held that the many New York franchise taxes are upon the *privilege* exercised and *not* upon the *measure* chosen. See *People v. Miller,* 177 N. Y. 51. If the franchise is not utilized there is no liability, as where an assignee for the benefit of creditors operates a business. *Matter of Heilbron, Wolf & Co., Inc.,* 224 App. Div. 14. And see *In re Century Silk Mills,* 12 Fed. (2nd) 292 (D. C. N. Y.); *In re Continental Candy Co.,* 291 Fed. 773 (D. C. N. Y.). A bankruptcy Trustee operating a property is in the same class with an individual operating on his own responsibility and for his own account.

The Circuit Court's distinction between a liquidating Trustee and a "conserving" trustee was never sanctioned by the New York Courts. It will be fully discussed in the brief, Point I.

2.

The Circuit Court of Appeals has decided an important question of Federal Law which has not been but should be settled by the Court.

The basis for Section 77 of the Bankruptcy Act and many of its effects have been set at rest by *Ex Parte Bald-*

win, 291 U. S. 610; *Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. Co.*, 294 U. S. 648; *Lowden v. Northwestern Nat. Bank & T. Co.*, 298 U. S. 160; *Palmer v. Massachusetts*, 308 U. S. 79; *Warren v. Palmer*, 310 U. S. 132, and other cases.

The present decision is a challenge to the authority of the Federal Government to enact bankruptcy legislation. In effect it means that the operations of a bankruptcy Trustee are dependent upon the sovereign power of the States which may grant, deny or take away or condition the exercise of the corporate existence of the Debtor, upon payment of so-called franchise taxes or license fees, and hence directly affect the bankruptcy power. If, as must be the fact, the termination of the corporate existence of the Debtor by New York State, would not impair the trusteeship or the District Court's jurisdiction, the Circuit Court's position must be untenable.

The decision of the Court in *Michigan v. Michigan Trust Co.*, 286 U. S. 334, and denial of certiorari in *Wick, et al., v. State of New Jersey*, 306 U. S. 648, do not affect this statement as will be fully pointed out in the brief.

If in certain cases, franchise taxes should be paid by Trustees under Section 77 of the Act, as the Circuit Court of Appeals for the Eighth Circuit decided in *Thompson v. Louisiana*, 98 Fed. (2nd) 108, the principle contended for here would not be in conflict. There probably are instances where the preservation of the franchise would be of value to those interested in the estate. The *Thompson* case appears to be such a case. *There are no facts in the case at bar which lead to the conclusion that the preservation of the Debtor's existence will be of value.* (See brief.) It should be established when and under what circumstances the Court having control of the estate should order the expenditure of cash to preserve the corporate franchise of the Debtor.

The foregoing statement is equally applicable to the situation after the enactment of the Act of June 18, 1934. It should be decided whether or not that Act has the effect of changing the tax laws of the States so that, from that date onward, subjects of taxation not covered by the taxing statute could be regarded as being taxed. Compare *Boteler v. Ingels*, 308 U. S. 57, where the privilege tax applied to all users of the highway. The Act of June 18, 1934, if there were any question as to the immunity of Trustees from taxation *otherwise applicable to them*, as apparently there was in some jurisdictions, removed immunity. And contrast R. S. 5219 where the States were permitted to tax national banks. (See brief, Point III.)

The real question for decision is whether the Act of June 18, 1934, was more than permissive in effect. Did it actually modify New York State legislation? As striking as this question may be, such is the effect of the decision of the Circuit Court.

3.

The Circuit Court of Appeals decided the case at bar by applying a construction of the Act of June 18, 1934, probably in conflict with decisions of this Court.

The following is quoted from the opinion of the Court (G. R. p. 73):

> "The court below ordered that the taxes which had been assessed under Sections 183 and 184 should be paid as expenses of administration pursuant to the Act of June 18, 1934. While the matter is not free from doubt, the decisions of the Supreme Court in *Michigan v. Michigan Trust Co.*, 286 U. S. 334; *Boteler v. Ingels*, 308 U. S. 57, and *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, 163, seem to indicate that franchise taxes imposed upon a corporation both for doing business and for being a

> corporation are proper charges against either a receiver or a trustee at least unless the trustee be only one in dissolution of the company."

Michigan v. Michigan Trust Co., decided prior to June 18, 1934, had held that an equity receiver was liable for Michigan franchise taxes similar to those of the State of New York because the event upon which taxability was predicated, namely, use of the franchise, actually took place. The Michigan Court had decided this fact. But neither *Boteler v. Ingels* nor *Palmer v. Webster & Atlas Bank* nor the principles upon which they rest, support the contention that an operating bankruptcy trustee is subject to franchise taxes after June 18, 1934. In point of fact, both would seem to support the contrary view, namely, that the Act of June 18, 1934, is not to be applied indiscriminately and without regard to the effect of tax payment on the estate and its creditors. The decision of the Court below is also inconsistent with *Philadelphia Co. v. Dipple*, 312 U. S. 168, for the same reasons. (Brief, Point III.)

WHEREFORE, your petitioner respectfully prays that writs of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of all proceedings in the cases entitled, "In the Matter of Fonda, Johnstown and Gloversville Railroad Company, Debtor (In Proceedings for the Reorganization of a Railroad), Judson Zimmer, Substitute Trustee, etc., Appellee-Appellant, New York State Tax Commission, Appellant-Appellee (Order No. 168)," and "In the Matter of Fonda, Johnstown and Gloversville Railroad Company, Debtor (In Proceedings for the Reorganization of a Railroad), Judson

Zimmer, Substitute Trustee, etc., Appellant, New York State Tax Commission, Appellee (Order No. 169)," to the end that said causes may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. 347), and the Rules of this Court, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of the said Code and the Rules of this Court, and that judgments of the Circuit Court of Appeals may be reversed by this Court.

JUDSON ZIMMER,
Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company,
Petitioner.
By LYDON F. MAIDER,
Attorney for Petitioner.

Gloversville, N. Y., April 15, 1942.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The opinions of the United States Circuit Court of Appeals for the Second Circuit have been reported in Federal Reporter, Second Series. The opinion as to Order No. 168 is printed at W. R. page 52 and at 126 F. 2nd 606. The opinion as to Order No. 169 is printed at G. R. page 71, and at 126 F. 2nd 604.

Statement.

The Debtor resulted from the consolidation in the year 1902 of three existing railroad corporations, namely, Fonda, Johnstown and Gloversville Railroad Company, Cayadutta Electric Railroad Company and Amsterdam Street Railroad Company. All of these were New York corporations. The resulting corporation, Fonda, Johnstown and Gloversville Railroad Company (the Debtor) operated its various transportation facilities from that time until April 20, 1933. On that date the Debtor filed a petition pursuant to the then new Section 77 of the Bankruptcy Act. The petition was approved as properly filed and thereafter J. Ledlie Hees was appointed Trustee. He continued in office until June 27, 1940, when petitioner became Substitute Trustee. From and after April 20, 1933, the Debtor continued in existence but its directors, officers and employees ceased functioning with respect to its property and business operations. It did not have title to any of its property. By virtue of the Act and the orders of appointment title had devolved upon the Trustee (W. R. p. 19; G. R. p. 25). The Debtor's officers not only exercised no control over any of its functions, but were in fact enjoined not to interfere (W. R. p. 24; G. R. p. 37).

The record with respect to Order No. 168 makes no statement as to the condition of the reorganization pro-

ceeding. The stipulation of facts, however (W. R. p. 13, *et seq.*) contains a paragraph from the Trustee's moving affidavit which is not disputed in any way, to the effect that "the Debtor has not availed itself of the privilege of exercising its corporate franchise or of doing business and in fact could not do so even if its officers, agents or employees should determine so to do, and further, the Debtor, from and after the 20th day of April, 1933, has not held any property in the State of New York or elsewhere, all of the property of the Debtor having been expressly transferred to deponent as such Trustee by said order of the District Court dated April 20, 1933" (W. R. p. 16).

In the proceedings resulting in Order No. 169 a similar uncontroverted statement appears in the record (G. R. pp. 11-12) and the statement of facts indicates that the reorganization proceeding had at the time resulted in a proposed report by the Examiner of the Interstate Commerce Commission. That report made no provision for the common stock of the Debtor, the preferred stock of the Debtor, the general unsecured creditors of the Debtor, and a considerable portion of the First Consolidated General Refunding Bonds of the Debtor. The Examiner's plan also anticipated the creation of a new corporation or the amendment of the Debtor's Charter, such decision to be left to the reorganization managers (G. R. p. 3).

Specification of Errors.

The errors which are intended to be urged are that the Circuit Court of Appeals erred:

1. In holding that prior to the Act of June 18, 1934, the Trustee in fact exercised any of the privileges specified in Sections 183 and 184 of the New York Tax Law as being events upon which taxation is predicated.

2. In holding that prior to the Act of June 18, 1934, the New York Tax Law imposed upon a bankruptcy Trustee operating a railroad under Section 77 of the Bankruptcy Act, the liability to pay a license fee for the privilege of exercising the Debtor's corporate franchise.

3. In holding that the Act of June 18, 1934, imposed a duty to pay franchise taxes under Sections 183 and 184 of the Tax Law in spite of the fact that the Trustee's order of appointment under the Bankruptcy Act conferred upon him all of the title to the Debtor's property.

4. In holding that the Trustee should pay taxes under Sections 183 and 184 as expenses of administration, there being no showing that such payment would in any way promote the administration of the estate or benefit the persons interested therein.

Summary of Headings.

Point I: Sections 183 and 184 of the Tax Law impose a license fee for the exercise of the corporate franchise and under the decisions of the New York Courts taxability results from the exercise of the privilege.

Point II: A bankruptcy Trustee appointed under Section 77 has title to the Debtor's property. The orders in the case at bar were in conformity with the statute.

Point III: The Act of June 18, 1934, applies only to situations where bankruptcy Trustees, claiming immunity by virtue of the bankruptcy proceeding only, fall within the classification of the Tax Laws.

Point IV: There being no order imposing a duty on the Trustee to preserve the Debtor's franchise and it not appearing that the persons interested in Debtor's estate would be benefited, there is no basis for these payments as expenses of administration.

POINT I.

Sections 183 and 184 of the Tax Law impose a license fee for the exercise of the corporate franchise and under the decisions of the New York Courts taxability results from the exercise of the privilege.

Article 9 of the New York Tax Law includes the several sections imposing taxes on corporations of various kinds. For instance, Section 180 levies an organization tax. Section 181 is a license tax on foreign corporations. Section 182 is a franchise tax on real estate corporations. Section 183 is a franchise tax on transportation and transmission corporations. Section 184 is an additional franchise tax on such corporations. (Laws 1909, Chapter 62 as amended 59 McKinney's Consolidated Laws of New York Annotated, pp. 361 *et seq.*)

Section 183, excluding inapplicable words, reads as follows:

> "* * * For the privilege of exercising its corporate franchise or of holding property in this State every domestic corporation * * * formed for or principally engaged in the conduct of * * * railroad * * * business * * * shall pay, in advance, an annual tax to be computed upon the basis of the amount of its capital stock within this State during the preceding year, and upon each dollar of such amount * * *."

The amount of the tax is specified as being a minimum of not less than $10 nor less than one mill on each dollar of the net value of its issued capital stock which shall have a minimum value of not less than $5 per share. There are other aspects of the formula which are not here pertinent. Suffice it to say that the per annum tax under this section if collectible from the Trustee is approximately $3,000, or about $27,000 to date.

Section 184 is denominated an "Additional Franchise Tax" and, excluding inapplicable words and phrases, reads:

> "Every corporation * * * formed for or principally engaged in the conduct of * * * surface railroad * * * business * * * shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State, an excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings from all sources within this State * * *."

The total taxes claimed under this section and directly involved in this litigation approximate $8,800 and increase at the rate of about $1,600 per annum. The total to date is about $14,000.

A "franchise" is a license or a privilege to do an act which one may not otherwise do, or to do an act in a manner which, but for the license, would not be permitted. So, persons who associate themselves together to carry on business may not do so in the corporate form without consent of the sovereign power which alone may grant the privilege. At one time special acts of the Legislature were required to create a corporation. In recent years, qualification with the requirements of general statutes only is necessary. In either event, the sovereign power permits something it may take away or may grant on

terms. In granting the franchise "to be" a corporation or "to do" as a corporation, the State of New York imposes "terms" by way of special forms of taxation—in this instance franchise taxes under Sections 183 and 184 of the Tax Law. The computation of the tax under the former section is by means of a formula having to do with the amount of "capital stock" and under the latter section by means of a formula having to do with "gross earnings." It should be noted that the tax is *on the franchise* measured by the amount of capital stock or gross earnings as the case may be. But in neither case is the tax on the measure—the tax is on the privilege. These views of the nature of a franchise tax are the views of the New York Courts. See *People v. Miller,* 177 N. Y. 51.

The New York Courts have never subscribed to the doctrine that liability for these taxes should be dependent upon whether the purpose of the proceeding is to dissolve or to reorganize. See *People v. Miller, supra; Central Trust Co. v. N. Y. C. & N. R. R. Co.,* 110 N. Y. 250; *Matter of Heilbron, Wolf & Co.,* 224 App. Div. 14. The practical implications of such a doctrine would produce peculiar results. Application of such a rule would be difficult. Rarely can the end result of a bankruptcy proceeding be known at its early stages. See the statement of Mr. Justice Cardozo in *Lowden v. Northwestern Nat. Bank & T. Co.,* 298 U. S. 160 at page 164. Much depends on the state of trade, the causes of financial difficulty, the history and purpose of the enterprise, and the nature of the assets. Furthermore, if such were the rule, the determination should be based upon findings accordingly. In the case at bar there is a complete absence not only of findings, but facts upon which findings might be made.

POINT II.

A bankruptcy Trustee appointed under Section 77 has title to the Debtor's property. The orders in the case at bar were in conformity with the statute.

As originally enacted in 1933, Section 77 (c) provided:

> "Upon approving the petition as properly filed the judge (1) may temporarily appoint from a panel of standing trustees qualified for such service to be selected and designated in advance by the commission a trustee or trustees of the debtor's estate, who shall have *all the title* and, subject to the control of the judge and consistently with the provisions of this section, *shall exercise all the powers of a trustee* appointed pursuant to Section 44 or any other section of this title, and, subject to the judge's control and the jurisdiction of the commission as provided by the Interstate Commerce Act as amended, shall have the power to operate the business of the railroad corporation * * *." (Italics supplied).

Although generally revised in 1935, the effect is not different (Subdivision 2 of subsection c):

> " * * * The trustee or trustees so appointed, upon filing such bond, shall have *all the title and shall exercise*, subject to the control of the judge and consistently with the provisions of this section, *all of the powers of a trustee* appointed pursuant to section 44 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor * * *." (Italics supplied).

The orders appointing the Trustee and his substitute (W. R. p. 19; G. R. p. 25), follow the section

almost *verbatim et literatim*. They simply confer title on the Trustee and authorize the business to be conducted. It should be noted that neither order carries forward to the Trustee (or substitute) the powers of an equity receiver.

The affidavits of the Trustee and Substitute Trustee (W. R. p. 15; G. R. p. 9), which are undisputed, indicate that none of the officers or agents of the Debtor had any control of the property in the hands of the Court from and after April 20, 1933. At no time after that date did the present Trustee or his predecessor exercise the corporate franchise of the Debtor. All operations were wholly *independent* of the Debtor and wholly *dependent* upon the authority and directions of the District Court. Paragraph "Fifth" (G. R. p. 11 at p. 13), concludes with this statement:

> "that since the date of said trusteeship, none of the persons, firms or corporations having an interest in the Debtor's property, by virtue of said claim or interest, has had any privilege or immunity by virtue of any statute or law of the State of New York which might permit the conduct of the Debtor's business by means of the corporate form."

The effect of the statute and of the order appointing the Trustee was to withdraw from the Debtor corporation every asset, tangible and intangible, and to confer title thereto upon the Trustee for the benefit of the creditors, stockholders and claimants against the Debtor. *Ipso facto* the Debtor became an empty shell, burdened with debt and claims. The Debtor may again become the owner of its property or the property may be turned over to a new corporation or sold. Meanwhile, unless the State of New York exercises its sovereign power to terminate the Debtor's existence, it continues. It is presumed that its liability for taxes also continues and that as the price of using the "shell" again, its entire tax liabilities would have to

be paid. But this is wholly different from supposing that the Trustee should use the cash in his hands to pay taxes to preserve this "shell." It would be like paying taxes on valueless property or conducting some other operation which would not benefit those interested in the Debtor as creditors or otherwise.

It is submitted that the effect of Section 77 of the Bankruptcy Act and the order appointing Trustee is not different from the case of a Trustee appointed in an ordinary liquidating bankruptcy who is authorized to conduct a business for a reasonable time (see Sections 1 and 44 of the Bankruptcy Act.)

The Circuit Court was of the opinion (G. R. p. 74), that there is a distinction between the status of a trustee under the older type of bankruptcy and the status of a trustee under Section 77. It is submitted that no such distinction is warranted. Section 77 was intended to provide an efficient and expeditious method of effecting the reorganization of a railroad. It was intended to be a departure from the former method of utilizing an equity receivership and judicial sale to accomplish an adjustment of the capital structure of the enterprise. The establishment by the Act of the Interstate Commerce Commission as an important factor in railroad reorganizations should be contrasted with its previously limited authority. But in substance Section 77 is an extension of bankruptcy procedure into a field in which the original statute was not adapted.

In Section 77 as originally enacted, frequent references were made to other portions of the Bankruptcy Act. For instance, in paragraph (c) a Trustee was authorized to exercise all the powers of a Trustee appointed "pursuant to Section 72 or any other section of this title." "In lieu of the schedules required by section 25" of the act different types of schedules were required. In addition to

the provisions of Section 29 authorizations were given for the stay of suits pending against the Debtor. These relationships have been carried into the Act as amended.

The old Bankruptcy Act did not conform to the practical problem of reorganizing a railroad. Section 77 supplies the additional machinery. Section 77, like the old Bankruptcy Act, is grounded upon the bankruptcy powers of the Federal Government found in the Constitution (*Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. Co.*, 294 U. S. 648).

The fact that the present proceeding, involving as it does a relatively small property, might result in a dissolution of the Debtor indicates the erroneous basis for the distinction made by the Court below. The Trustee points out that whether the Debtor corporation will be the reorganized corporation or whether one or more new corporations will eventually hold the Debtor's property depends upon the facts of every case. In determining whether the Debtor corporation will be the reorganized corporation various considerations will be pertinent. One will be whether it would be more expedient to use the Debtor corporation. Here the inquiry will be concerned with matters of expense, existing corporation laws as compared with previous corporation laws or the laws of other States, the tax cost of a new corporation as compared with paying accrued franchise taxes of the Debtor, whether some property may be sold to existing corporations or individuals subject to certain debts. While in the case of a large property such as a railroad system covering many States (see *Thompson v. Louisiana*, 98 Fed. 2nd 108), the Court may make an early determination that, on the whole, the Debtor as reorganized will take over the property from the Trustee, it is by no means certain in every case and it is especially uncertain in the case of a relatively small property such as the one now before the

Court. Absolutely nothing in this record could support the view that the Debtor should be made use of in aid of the reorganization.

In contrast to the status of the Trustee as hereinabove outlined the attention of the Court is respectfully directed to the following provision of Section 77 as now in force (subdivision [2], paragraph [c]):

> "• • • Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe."

It seems clear that if the Debtor were in possession of its property under the direction of the Court it would be exercising its corporate franchises as fully as though no proceedings had been taken. It is believed that the portion of the statute above quoted illustrates the contention made by the Trustee.

The decisions of the Circuit Court of Appeals sought to be reviewed go farther than those of any other Court which has dealt with this problem under either Section 77 or Section 77 (b). In *re Pressed Steel Car Co.*, 100 Fed. (2nd) 147 (certiorari denied 306 U. S. 648), the Circuit Court of Appeals for the Third Circuit said, "If the claim be allowed it must be as an expense of administration incurred by the Trustees." It is a fair reading of the Circuit Court's opinion in that case that the Trustees of the Pressed Steel Car Co. "had the duty to preserve the corporate franchise." Likewise, in *Thompson v. Louisiana*, 98 Fed. 2nd 108, the District Court had made a spe-

cific direction to the Trustee. We quote from the opinion (98 Fed. 2nd 109):

> "By orders entered from time to time, the Trustee was directed to pay the cost of maintaining the corporate existence of the Debtor, to take any necessary action to protect the corporate organization, to maintain its railroads and property wherever situate, to manage and conduct its business, to reimburse counsel for expenses incurred in connection with the maintenance of its corporate existence and organization, and the Trustee was authorized to exercise the powers of an equity receiver."

The petitioner contends that it is wholly within the discretion and the power of the District Court to determine, upon a proper showing, whether, under all the circumstances, the corporate franchise is potentially of such value to the various creditors and claimants against the Debtor's property as to justify the expense of maintaining it. Undoubtedly the Court will take judicial notice of the fact that the Missouri Pacific Railroad Company is a far flung organization having lines in many States. It may well be that there are reasons why the right to carry on business in the corporate form under previously granted franchises "to be" and "to do" will be of real aid to the reorganization and the expense by way of taxation may be justified. In the case at bar a small property located wholly in one State is involved. Its future is uncertain. The Debtor may be reorganized. If so, franchise taxes may be paid, or the property in the possession of the Trustee may be sold at a judicial sale, or the property may be transferred to one or more newly created corporations. Usually these decisions are grounded upon matters of policy and expedition. There is not a scintilla of evidence in the record upon which could be predicated the fact that the District Court has ordered the preservation of the corporate franchise of the Debtor or that its con-

tinued existence is of such actual or probable consequence as to justify payment of money by way of taxation or otherwise.

POINT III.

The Act of June 18, 1934, applies only to situations where bankruptcy Trustees, claiming immunity by virtue of the bankruptcy proceeding only, fall within the classification of the tax laws.

This statute is here set forth in full:

> "Any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same (June 18, 1934, c. 585, 48 Stat. 993)" (U. S. C. A. Title 28, Section 124-a).

The Supreme Court has already indicated that this statute is not to be applied blindly and without due consideration of the facts and circumstances of the case. As was pointed out in *Palmer v. Webster & Atlas Bank,* 312 U. S. 156, the legislative history discloses its purpose. Lower Federal Courts had held a Federal receiver operat-

ing a business exempt from State sales taxes. Such was the nature of the evil sought to be eliminated.

Many years ago the lower Federal Courts had held that franchise taxes of the very type involved in this litigation were not payable by bankruptcy Trustees. *Re Continental Candy Co.*, 291 Fed. 773 (D. C. S. D. N. Y.); *Re Century Silk Mills*, 12 Fed. 2nd 292 (D. C. S. D. N. Y.). This was because, as the petitioner here contends, the Trustee though he operated the business did not utilize the corporate franchise. *In other words, the event upon which taxation was predicated did not occur.* In *Howe v. Atlantic, Pacific & Gulf Oil Co.*, 4 Fed. Supp. 162, the event upon which taxability was predicated, namely, a sale of motor fuel, had taken place but the receiver claimed and had been accorded immunity because of the nature of his position. The same situation existed in the case of *Boteler v. Ingels*, 308 U. S. 57, where the bankruptcy Trustee had sought immunity from a tax imposed by the State of California on all persons who used its highways. There again the Trustee sought immunity because of the nature of his position, there being no doubt that the event upon which taxation was predicated had taken place.

The Court below by not first addressing itself to the question as to whether the taxable event had taken place has simply assumed without deciding that the Act of June 18, 1934, is applicable. The crucial point overlooked gives the effectiveness of the Act altogether more scope than is justified. The decision below means that from June 18, 1934, onward, tax laws of the State of New York that were not applicable to bankruptcy Trustees because they were not covered by the terms of the tax laws themselves, were made effective. The Legislature of the State of New York had not spoken. In some way the power of Congress had created a liability which did not theretofore exist.

Contrast the situation in the *Atlantic, Pacific & Gulf Oil Co.* case and the *Boteler* case, *supra,* where the States of Missouri and California respectively had imposed taxation on all persons with respect to their acts in certain fields. Immunity had been claimed because of the source of the power authorizing the fiduciary to act. Throughout the administration of the estate of the Fonda, Johnstown and Gloversville Railroad Company neither the Substitute Trustee nor his predecessor has ever claimed immunity from taxation or from any other Governmental regulation because of the nature of his appointment, and immunity from taxation under Sections 183 and 184 of the Tax Law is not claimed for this reason. Non-liability for these taxes is rested solely upon the ground that the Legislature of the State of New York never intended to impose a tax on anyone unless *in fact* the privilege of using a corporate franchise or carrying on business in the corporate or organized capacity were exercised. The same contention was made by the assignee for the benefit of creditors in the case of *Matter of Heilbron, Wolf & Co., Inc.,* 224 App. Div. 14, and Trustees in bankruptcy *In re Continental Candy Co., supra,* and *Century Silk Mills, supra.*

It is believed that the real intention of Congress was the same as was present when R. S. 5219 (Act of June 3, 1864, chap. 106, 13 Stat. L. 111) was passed. This is confirmed by the action taken by the State of New York with respect to the taxation of national banks. New York, prior to 1864, had taxed banks organized under its laws and the capital thereof under Chapter 419 of the Laws of 1847 and Chapter 240 of the Laws of 1863. To conform with the permission of Congress, the State of New York changed its scheme of taxation and imposed a tax on the shares of national banks (chap. 97 of the Laws of 1865, and chap. 761 of the Laws of 1866).

Palmer v. Webster & Atlas Bank, 312 U. S. 156, and *Philadelphia Co. v. Dipple,* 312 U. S. 168, were cases where the Trustees were accorded immunity from a tax which was the obligation of the Debtor, because of the character of the Debtor's obligation. In those cases the obligation of the Debtor (The New York, New Haven & Hartford in the first case, and The Pittsburg Railways Co. in the second case) was contractual, having arisen out of a lease. The tax obligation was the primary obligation of the lessor. The Act of June 18, 1934, was held not to be applicable because the tax did not arise out of the business conducted by the Trustee. It arose out of the business conducted by the primary obligor, which in both cases was the lessor of the property of the Debtor. Certainly these two decisions do not point to liability on the part of the Trustee in the case at bar. At most, they can be said to indicate that the Act under discussion is not to be applied without reference to the effect of the tax payment. The test would seem to be that if the fiduciary claiming immunity clearly falls within the classification of the tax laws, he cannot escape because of the nature of his official position. On the other hand, if the Trustee does not fall within the classification of the tax laws as in the case at bar, or if he cannot be said to be conducting the business with respect to which a tax is claimed to be due, he will not be held to be liable. In this connection it is always important to inquire whether the effect of taxation will be to impose a burden upon persons who have no relation to the tax. Such a burden was present in the *Palmer* case and the *Philadelphia Co.* case, and it is present in the case at bar. Section 183 contains a formula for the computation of a tax which is related to the stock capitalization of a Debtor as to the holders of which there has been found to be no equity. The effect of the decision of the Court below is that persons in the position

of creditors and who are represented by the Trustee as a matter of fact, are paying a tax computed by a measure of which they are not at all concerned.

POINT IV.

There being no order imposing a duty on the Trustee to preserve the Debtor's franchise and it not appearing that the persons interested in Debtor's estate would be benefited, there is no basis for these payments as expenses of administration.

Much that has been said in the previous points is applicable here. It has been urged that there is no basis in the record for a finding that the present taxes are proper expenses of administration. Undoubtedly if the taxes are a proper claim they can be considered as expenses of administration. However, it is improper to establish liability and give this as a reason unless it should appear from the record that payment of franchise taxes is in fact related or incidental to some advantage which will accrue to the trust estate and the bondholders and creditors of the Debtor.

If the preservation of the corporate existence of the Fonda, Johnstown and Gloversville Railroad Company had been determined by the Court to be worthwhile and the Court had so ordered as in the cases of *Thompson v. Louisiana, supra,* and *In re Pressed Steel Car Co., supra,* the taxes in question ought to be paid. In the case at bar, however, not only has no such determination been made, but it clearly appears from the record that no such advantage exists. If, as certainly must be the case, the test of payment is whether there is an advantage to the estate or the bondholders and creditors, then a finding has been

made which is binding upon these groups without an opportunity to them to be heard or to complain.

The petitioner is not here asserting that there is no possibility that the taxes under consideration should be paid as an expense of administration. The petitioner is asserting, however, that such a determination ought to be made in the usual way at which time those interested in the Debtor's estate could appear and express their views and the primary consideration would be whether the preservation of the Debtor's corporate entity would advance the interests of those who have a stake in its property.

A reading of the opinions of the Circuit Court of Appeals and the Trial Court (W. R. p. 56 *et seq.;* G. R. p. 65 *et seq.*, 71 *et seq.*) will convey the impression that the expense of administration theory follows upon the heels of the determination of the other questions and yet it is urged as a sound basis for deciding the issue of liability.

It is respectfully submitted that without an express finding of fact (a) that the corporate entity is or probably will be important in effectuating the reorganization, and (b) that those interested in the Debtor's property will be served, there is no basis for tax payment as an expense of administration.

Conclusion.

Petitioner respectfully submits: that the Circuit Court of Appeals has decided an important question of local law, namely, the applicability of the Tax Law of the State of New York in a way which is probably in conflict with the decisions of the New York Courts; that the Circuit Court has decided an important question of Federal Law, namely, the legal effect of the appointment

and operations of a bankruptcy Trustee under Section 77, which, so far, has not received the attention of this Court; and that to the extent the opinion of the Circuit Court of Appeals rests upon the decisions of *Boteler v. Ingels* and *Palmer v. Webster and Atlas Bank,* there would appear to be a misunderstanding of the determinations made in those cases. Finally, the case at bar involves an important question of the administration of properties in the hands of the Federal Courts which should be clarified by the Court.

It is, therefore, respectfully submitted that these causes call for the exercise by this Court of its supervisory powers and that to such end, writs of certiorari should be granted and that this Court review the decisions of the Circuit Court of Appeals for the Second Circuit and finally reverse them.

Respectfully submitted,

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Gloversville, N. Y.,
April 15, 1942.

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IN THE

Supreme Court of the United States

October Term, 1941.

1254

Nos. 1255-~~1256.~~

JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY,
Petitioner,
v.
NEW YORK STATE TAX COMMISSION,
Respondent.

Order No. 168.

JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY,
Petitioner,
v.
NEW YORK STATE TAX COMMISSION,
Respondent.

Order No. 169.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, *Petitioner*, v. NEW YORK STATE TAX COMMISSION, *Respondent*.	Order No. 168.
JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, *Petitioner*, v. NEW YORK STATE TAX COMMISSION, *Respondent*.	Order No. 169.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The New York State Tax Commission, the respondent in the above entitled causes, respectfully prays that the petition of the petitioner, Judson Zimmer, Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company, for a writ of certiorari to the Circuit Court of Appeals for

the Second Circuit be dismissed, or that the writ of certiorari be denied for the reason that the Court should not in the exercise of sound discretion grant the same.

Statement of the Case.

The facts herein are not in dispute and are correctly set forth in the petition for the writ herein, and for that reason we refrain from burdening the Court with mere restatement.

Questions Involved.

The questions which were before the Circuit Court of Appeals for the Second Circuit for determination were as follows:

1. Is a Trustee who operates a railroad during a period of reorganization liable for corporation franchise taxes assessed under Sections 183 and 184 of the New York State Tax Law and accruing subsequent to the filing of the petition for reorganization on April 20, 1933, and prior to June 18, 1934, when Congress enacted Section 124-a of the Judicial Code (U. S. C. A. Title 28, §124-a)?

2. Is the Trustee of a railroad corporation in reorganization, who continues to operate the business of a railroad, liable to the State of New York for corporation franchise taxes assessed under Sections 183 and 184 of the New York State Tax Law as the result of the enactment by Congress of the Act of June 18, 1934 (U. S. C. A. Title 28, §124-a), which provides as follows:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes

applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States, imposing the same."

3. Are such taxes a proper expense of administration?

ARGUMENT.

I.

The Court should not in the exercise of its sound discretion allow the writ herein.

The Circuit Court of Appeals in passing upon these cases has said:

> "While the matter is not free from doubt, the decisions of the Supreme Court in *Michigan v. Michigan Trust Co.*, 286 U. S. 334; *Boteler v. Ingels*, 308 U. S. 57 and *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, 163, seem to indicate that franchise taxes imposed upon a corporation both for doing business and for being a corporation are proper charges against either a receiver or a trustee at least unless the trustee be only one in dissolution of the company. In the last two decisions cited, the Act of June 18, 1934, was discussed and held to cover even a trustee in ordinary bankruptcy. Justice Black writing for the court in *Boteler v. Ingels*, 308 U. S. at page 60, not only said that the Act of June 18, 1934, required payment of certain franchise taxes by a trustee but also made the following observation:
>
> 'We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated by a bankruptcy trustee makes the business immune from state laws and

> valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to state taxes "the same as if such business(es) were conducted by an individual or corporation".' "

The questions involved herein have been similarly passed upon by the Circuit Courts of Appeal for the Third and Eighth Circuits in the cases of *In re Pressed Steel Car Co.*, 100 Fed. (2d) 147, and in *Thompson v. State of Louisiana*, 98 Fed. (2d) 108, and *Thompson v. State of Arkansas*, 98 Fed. (2d) 112.

It would seem, therefore, in view of the decisions of the Circuit Courts of Appeal for the Second, Third and Eighth Circuits, referred to above, and the expressions of this Court in *Boteler v. Ingels*, 308 U. S. 57, and *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, that there is a uniformity of opinion with respect to the questions presented by the petition herein, and since that is so the petition for the writ of certiorari herein should be denied.

Respectfully submitted,

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APPENDIX.

Section 183 of the New York State Tax Law, excluding inapplicable words and phrases, reads as follows:

> " * * * For the privilege of exercising its corporate franchise or of holding property in this State every domestic corporation * * * formed for or principally engaged in the conduct of * * * railroad * * * business * * * shall pay, in advance, an annual tax to be computed upon the basis of the amount of its capital stock within this State during the preceding year, and upon each dollar of such amount * * * ."

Section 184 of the New York State Tax Law has to do with an "additional franchise tax on transportation and transmission corporations and associations" and, excluding inapplicable words and phrases, reads as follows:

> "Every corporation * * * formed for or principally engaged in the conduct of * * * surface railroad * * * business * * * shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State, an excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings from all sources within this State * * * ."